

HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LESLIE JACK, Individually and as Personal
Representative of the Estate of PATRICK
JACK; DAVID JACK, individually,

Plaintiffs,

v.

ASBESTOS CORPORATION LTD., et al.,

Defendants.

No. 2:17-cv-00537 JLR

PLAINTIFFS' TRIAL BRIEF
REGARDING APPLICATION OF
PRE-WPLA LAW

ORAL ARGUMENT REQUESTED

Plaintiffs Leslie Jack, individually and as personal representative of the Estate of Patrick Jack, and David Jack, individually, file this Trial Brief in support of their position that the Washington Products Liability Act (WPLA) should not be applied in this case.

I. RELIEF REQUESTED

The Court should apply Washington common law in existence before 1981 given that substantially all of decedent Patrick Jack's exposures to Defendants' asbestos products occurred prior to 1981. At a minimum, because the application of pre-WPLA law turns on the years of Mr. Jack's exposure, this is a factual matter for consideration by the jury at trial. The Court should also apply joint and several liability, as the proportionate fault scheme does not apply to asbestos cases.

II. ARGUMENT AND AUTHORITIES

A. Pre-WPLA law applies to Plaintiffs' claims.

The WPLA applies to product claims arising on or after its effective date of July 26, 1981. RCW 4.22.920(1); *Fagg v. Bartells Asbestos Settlement Trust, et al.*, 184 Wn. App. 804, 812 (2014). When, however, the plaintiff's exposure to the product in question is "prolonged or continuous in nature . . . Washington courts consider when 'substantially all' of the exposure occurred in determining when the claim arises." *Id.* The term "substantially all" was intended to mean "nearly all," and has been quantified at 85% or more. *Id.* at 813. The term substantially all is measured by the plaintiff's exposure to a specific defendant's products and the WPLA will apply only if substantially all of a plaintiff's exposure to that defendant's product occurred *after* July 26, 1981. *Id.* at 815.

In cases where "substantially all" of the injury-producing events occurred prior to the WPLA's effective date, Washington law holds that the product liability claim "arises" prior to the Act's effective date. *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 472 (1991). Over two decades of litigation, Washington courts have consistently held that in asbestos-related cases in which the "injury producing" asbestos exposure occurs prior to the effective date of the WPLA, but the harm associated with this injury (diagnosis with an asbestos-related disease) manifests itself after the WPLA's effective date, the product liability claim arises *prior* to the WPLA's effective date. *Id.*

For instance, in *Krivanek v. Fibreboard Corp.*, the plaintiff was exposed to the defendant's asbestos-containing products from 1953 to 1986 at the Puget Sound Naval Shipyard, but was diagnosed with mesothelioma in 1987. *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632 (1993). The court found that liability standards pre-dating the WPLA applied

1 to Krivanek's claim and stated that "where the harm results from exposure, and it appears
2 that substantially all of the injury-producing events occurred prior to the adoption of the 1981
3 Act, the 1981 Act does not apply." *Id.* at 635. Similarly, in *Viereck v. Fibreboard Corp.*,
4 Viereck was exposed to the defendant's asbestos-containing products from 1956-1960 but
5 was not diagnosed with mesothelioma until 1992. *Viereck v. Fibreboard Corp.*, 81 Wn. App.
6 579, 584-85 (1996). The court likewise held that because "substantially all the events
7 producing" Plaintiff's mesothelioma occurred before 1981, the WPLA was not applicable."
8 *Id.* Courts that have held the WPLA applies have done so when substantially all of the
9 exposure occurred after 1981 (*See Macias v. Saberhagen Holdings Inc.*, 175 Wn.2d 402, 406
10 (2012) (finding the WPLA applied when only four of the twenty six years of exposure pre-
11 dated 1981)).
12

13
14 Numerous Washington cases have allowed Plaintiffs to assert pre-WPLA law when
15 most of the exposure occurred prior to 1981. *See, e.g., Lunsford v. Saberhagen Holdings,*
16 *Inc.*, 166 Wn.2d 264 (2009) (child of asbestos worker who contracted mesothelioma from
17 contact with father's clothing could assert pre-WPLA rule of strict liability for asbestos
18 exposure); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (2008) (pre-WPLA law applied
19 to claims of Plaintiff who was exposed to asbestos aboard navy ships from 1967 until the
20 early 1980s and was diagnosed with mesothelioma in 2003); *Mavroudis v. Pittsburgh-*
21 *Corning Corp.*, 86 Wn. App. 22, 935 (1997) (claim of asbestos worker who was exposed
22 prior to 1981, but who discovered his injury in 1993, was governed by pre-WPLA law);
23 *Koker*, 60 Wn. App. at 472 (trial court was incorrect in applying the WPLA to the claims of a
24 pipefitter who was exposed to asbestos in the 1960s, 1970s, and 1980s, but was not
25 diagnosed with asbestos-related pleural thickening until 1986).
26

1 Here, Plaintiffs contend substantially all of Patrick Jack's exposure to Defendants'
2 products occurred prior to 1981. As the Court set forth in its summary judgment order,
3 Mr. Jack had exposure to Ford and Borg-Warner products as a professional automotive
4 mechanic at Dexter Avenue Auto Repair from 1962 to 1964 and at Apex Mobile Home
5 Towing from 1964 to 1968. (Dkt. # 706 at 8, 12-13). He also did personal automotive work
6 for several decades, including up into the mid-1980s. (Dkt. # 706 at 10-12).
7

8 Regarding Patrick Jack's exposure to Victor gaskets, for which DCo is responsible,
9 that exposure also occurred in Mr. Jack's professional capacity at Dexter from 1962 to 1964.
10 Ex. 1 at 543:20-24¹. Jack installed hundreds of Victor gaskets at Dexter. *Id.* at 544:23-545:3.
11 He also used Victor gaskets on his personal vehicles throughout his life. Ex. 2 at 210:11-23.
12 Victor stopped making asbestos gaskets in 1988, however. Ex. 3 at 8, 11.
13

14 Thus, while Mr. Jack's exposures to asbestos brakes, clutches, and gaskets did
15 continue after 1981, the bulk of his exposure was necessarily when he was a professional in
16 the 1960s. The Court should find that at least 85% of Patrick Jack's exposures to Defendants'
17 products occurred prior to 1981. Unlike *Macias*, here all of Mr. Jack's professional exposure
18 pre-dated 1981 and most of his exposure from personal work did too.
19

20 If the Court finds that it cannot be decided as a matter of law that substantially all of
21 Mr. Jack's exposures occurred prior to 1981, this issue should be submitted to the jury. In an
22 asbestos case tried last year in Washington Superior Court, the jury was asked to decide a
23 threshold question of whether substantially all of the plaintiff's exposures occurred prior to
24 July 26, 1981. Ex. 4. Their answer to that question determined whether they evaluated the
25 plaintiff's claims under the common law or under the WPLA. Plaintiffs ask the Court to
26

¹ Unless otherwise stated, all exhibits are to the Declaration of Benjamin H. Adams filed herewith.

1 employ a similar procedure in this case and let the jury decide the factual issue of when
2 substantially all of Mr. Jack's exposures occurred.

3 **B. Defendants are subject to joint and several liability.**

4 Under Washington law, joint and several liability law always applies in asbestos
5 cases. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 668-69 (Wash. *en banc*. 1989);
6 *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 618-20 (2006).
7

8 The principle of joint and several liability for indivisible injuries was set forth in
9 *Seattle-First v. Shoreline Concrete*, 91 Wn.2d 230 (1978), in which the Supreme Court held
10 as follows:

11 The procedural cornerstone of tort law is the assurance of full compensation to
12 the injured party. To attain this goal, the procedural aspect of our rule permits
13 the injured party to seek full recovery from any one or all of such tort-feasors.
14 So long as each tort-feasor's conduct is found to have been a proximate cause
15 of the *indivisible* harm, we can conceive of no reason for relieving that tort-
16 feasor of his responsibility to make full compensation for all harm he has
17 caused the injured party. What may be equitable *between multiple tort-feasors*
18 is an issue totally divorced from what is fair to the injured party.

19 *Id.* at 236 (emphasis added).

20 Effective in 1986, joint and several liability was abolished for most causes of action
21 in favor of proportionate fault. RCW 4.22.070. There is an exception, however, for "any
22 cause of action relating to hazardous wastes or substances or solid waste disposal sites."
23 RCW 4.22.070(3)(a). The exception has been held to apply to asbestos cases such as this one.
24 *See Sofie*, 112 Wn.2d at 668-69; *Coulter*, 135 Wn. App. at 618-20.

25 In *Sofie*, the plaintiff brought suit against asbestos manufacturers for damages arising
26 from exposure to asbestos during his career as a pipefitter. 112 Wn.2d at 639. The Court
analyzed the history and plain language of the hazardous substance exception to
proportionate fault, finding that it was not limited to environmental cases and that the trial

1 court had properly applied the exception to impose joint and several liability on the
2 defendants in the context of an asbestos exposure claim. *Id.* at 668.

3 In *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235 (1987), the Washington Supreme Court
4 applied joint and several liability without analysis. The Court approved the following
5 instruction on proximate cause:
6

7 When the concurring negligence and/or product liability of two or more
8 defendants are each proximate causes of the harm, each is liable regardless of
the relative degree in which each contributes to the harm.

9 *Id.* at 268.

10 In *Coulter*, the Washington Court of Appeals revisited this issue again and held that
11 under *Sofie*, “claims based on asbestos exposure fall within the ‘hazardous substances’
12 exception to the 1986 tort reform act and that joint and several liability therefore applies.”
13 135 Wn. App. at 618. The court rejected the defendants’ argument that *Sofie*’s analysis of
14 joint and several liability was dicta. *Id.* at 620. The court found it significant that “the
15 Legislature has not revised the hazardous substance exception in RCW 4.22.070(3) since the
16 *Sofie* decision,” and found this to be “an indication of legislative acquiescence of the court’s
17 interpretation.” *Id.*

18
19 Therefore, under controlling law, joint and several liability applies to Defendants in
20 this case.

21 **III. CONCLUSION**

22
23 Plaintiffs ask the Court to apply pre-WPLA law to Plaintiffs’ causes of action given
24 that substantially all of Mr. Jack’s exposures to Defendants’ products occurred prior to 1981.
25 If the Court decides otherwise the matter should be submitted to the jury to make a factual
26 finding. In any event, the Court should apply joint and several liability.

1 DATED this 21st day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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